



Board of Management, Kapsimbiri Secondary School v Chepngetich (Suing as the Legal Representative of the Estate of Nicholas Kipkorir Chirchir (Deceased)) (Civil Appeal 037 of 2023) [2025] KEHC 41 (KLR) (13 January 2025) (Judgment)

Neutral citation: [2025] KEHC 41 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL 037 OF 2023
RL KORIR, J
JANUARY 13, 2025**

BETWEEN

THE BOARD OF MANAGEMENT, KAPSIMBIRI SECONDARY SCHOOL APPELLANT

AND

**BEATRICE CHEPNGETICH RESPONDENT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS KIPKORIR CHIRCHIR (DECEASED)**

(Being an Appeal from the Judgment of the Senior Principal Magistrate, Muleka E. at the Senior Principal Magistrate's Court at Sotik, Civil Suit Number 142 of 2018)

JUDGMENT

1. The Respondent (then Plaintiff) as the legal representative of the estate of Nicholas Kipkorir Chirchir, sued the Appellant (then Defendant) for general and special damages that arose when her husband (deceased) while riding motor cycle registration number KMDV 877Q was allegedly knocked down by motor vehicle registration number KCE 815D that allegedly belonged to the Appellant.
2. The trial court conducted a hearing where the Respondent called two witnesses and the Appellant called three witnesses.
3. In its Judgment dated 6th June 2023, the trial court found the Appellant 70% liable for the accident and awarded the net sum of Kshs 1,955,100/= to the Respondent (then Plaintiff).
4. Being aggrieved with the Judgment of the trial court, the Appellant filed its Memorandum of Appeal dated 24th May 2023 appealing against the whole Judgement and relied on the following grounds: -



- i. That the learned Magistrate erred in law and fact in finding the Appellant liable to the tune of 70%.
 - ii. That the learned Magistrate erred in law and fact in disregarding the overwhelming evidence tendered by the defence in apportioning liability between the Appellant and the deceased.
 - iii. That the learned Magistrate erred in fact in failing to find that the deceased was the author of his own misfortune.
 - iv. That the learned Magistrate erred in law and fact in assessment of damages payable.
 - v. That the learned Magistrate misdirected himself by failing to consider and apply some weight on the evidence and the submissions by the Appellant while arriving at the Judgement.
 - vi. That the learned Magistrate erred in law and fact in relying on extraneous evidence in arriving at the decision on liability and quantum.
 - vii. That the learned Magistrate misdirected himself in awarding the Respondent funeral expenses yet the same was neither pleaded nor proved.
5. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123.

The Plaintiff's/Respondent's case.

6. Through her Amended Complaint dated 7th April 2020, the Respondent stated that her husband Nicholas Kipkorir Chirchir (deceased) was riding motorcycle registration number KMDV 877Q when he was hit by motor vehicle registration number KCE 815D which was driving in the wrong lane along Bomet-Kaplong road.
7. The Respondent stated that the Appellant being the registered owner of motor vehicle registration number KCE 815D, was vicariously negligent in causing the accident and particularized the negligence in paragraph 4 of the Amended Complaint. It was the Respondent's further case that the deceased had dependants and the said dependants were listed in paragraph 7 of the Amended Complaint.
8. It was the Respondent's case that at the time of the death of the deceased, he was aged 30 years and was the family's breadwinner.
9. The Respondent's claim against the Appellant was for special and general damages under the *Law Reform Act* and *Fatal Accidents Act*.

The Appellant's/Defendant's case

10. Through its Amended statement of defence dated 8th December 2020, the Appellant denied that it was the registered owner of motor vehicle registration number KCE 815D.
11. The Appellant denied the particulars of negligence levelled against it. That if any accident happened, it was caused solely by the negligence of the deceased. He particularized the negligence in paragraph 6 of its Amended Defence.
12. On this Appeal, parties took directions to file submissions to canvass the Appeal.



The Appellant's submissions.

13. In submissions dated 23rd August 2024, the Appellant submitted that the trial court erred in its apportionment of liability in the ratio of 70:30 in favour of the Respondent. That PW1 who was the deceased's widow did not witness the accident and could not tell how the accident occurred. The Appellant submitted that PW2 confirmed that the accident was under investigations and that the Applicant's motor vehicle was not to blame for causing the accident. That PW2 did not produce the police file nor did he take sketch plans or map of the area where the accident occurred.
14. It was the Appellant's submission that a Police Abstract cannot be held as conclusive proof of liability. That the Respondent ought to have called more witnesses to corroborate her testimony. It was its further submission that the weight of evidence used to find its driver liable was very low and this court ought to dismiss the Respondent's suit. It relied on Mashru Odhiambo (Civil Appeal 21 of 2022) [2023] KEHC 25389 (KLR) (14 November 2023) (Judgment) where the appeal court set aside the trial court's decision and apportioned 100% liability against the Appellant and Kennedy Nyangoya vs Bash Hauliers (2016) eKLR.
15. On damages, the Appellant submitted that the award of Kshs 100,000/= for pain and suffering was excessive and ought to be replaced with a lower figure. That the deceased died on the spot and it was presumed that he did not suffer any prolonged pain and suffering. It relied on Awale Transporters Ltd Mombasa v Wakhungu & another (suing as legal representatives of the estate of Alfred Sabwami Namasabu - Deceased) (Civil Appeal E103 of 2022) [2024] KEHC 2680 (KLR) (6 March 2024) (Judgement) where the court awarded Kshs 50,000/= for pain and suffering and Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (suing as personal representatives of the estate of Stephen Sinange alias Reuben Sinange (Deceased) (2022) eKLR, where the court upheld the award of Kshs 50,000/= for pain and suffering.
16. It was the Appellant's submission that the award of Kshs 150,000/= under loss of expectation of life was excessive and an award of Kshs 100,000/= would be sufficient. It relied on Ndungu Wambui Christine & 2 others vs Muusi Nzivo Maingi aka Muusi Uzivo & another (2020) eKLR.
17. The Appellant submitted that the Respondent did not adduce any evidence to show that the deceased was a driver and had a source of income at the time of his death. That the trial court ought to have applied the provisions of the minimum wages (Regulation of Wages (General) (Amendment) Order 2015) with respect to a general labourer at Kshs 5,844.20/= per month. The Appellant submitted that trial court erred when it used a multiplier of 30 years as it did not consider the vagaries of life. The Appellant proposed a multiplier of 20 years and relied on Cromwell Mzame vs Zablon Mwanyumba Lalu (suing as administrator of the estate of Allen Warito Lalu (Deceased) & another (2022) eKLR and Kenya Power & Lighting Company Ltd vs James Muli Kyalo & another (2020) eKLR.

The Respondent's submissions.

18. Through their submissions dated 20th September 2024, the Respondent submitted that the trial court did not err when it found the Appellant 70% liable for causing the accident. That the bus driver blamed the deceased for causing the accident but could not prove that a pedestrian crossed the road. She further submitted that the Police Abstract stated did not mention a pedestrian as a cause of the accident.
19. It was the Respondent's submission that the bus driver failed to explain what he did to avoid causing the accident. That the Appellant owed a duty of care to other road users and his failure to do so amounted to contributory negligence.



20. On general damages, the Respondent submitted that the trial court did not err when it awarded Kshs 100,000/= for pain and suffering, Kshs 150,000/= for loss of expectation of life and Kshs 2,400,000/= for loss of dependency. That the Appellant did not oppose the multiplier of 30 years and income of Kshs 10,000/= adopted by the trial court in the trial court and only did so in their submissions in this Appeal and this amounted to re-opening of the case.
21. It was the Respondent's submission that the trial court did not err when it awarded her Kshs 63,000/= as special damages. That the Appellant did not oppose the special damages in the trial court and only did so in their submissions in this Appeal.
22. I have gone through and carefully considered the Record of Appeal dated 20th February 2024, the Supplementary Record of Appeal dated 23rd February 2024, the Appellant's written submissions dated 23rd August 2024 and the Respondents' written submissions dated 20th September 2024. The two issues for my determination were:-
 - i. Liability
 - ii. Quantum

i. Liability

23. In prosecuting her case, the Respondent testified as PW1 where she stated that the deceased was riding motor cycle registration number KMDV 877Q when he was run over by motor vehicle registration number KCE 815D make Isuzu bus. When she was cross examined, she stated that she did not witness the accident.
24. The Respondent also called No. 72792 PC Raymond Nzaru (PW2) from Bomet Police Station as a witness. PW2 testified that the accident between the motor cycle and the Isuzu bus occurred at Tarakwa along Bomet-Kaplong road at around 8.30 p.m. PW2 further testified that the accident was under investigations. He produced a Police Abstract at P.Exh 5. When PW2 was cross examined, he testified that he was not the investigating officer and that from the Police Abstract, no one was blamed from the accident.
25. On the other hand, the Appellant testified as DW1. DW1 stated that he was the driver of the Isuzu bus and on the material day, as he was heading towards the general direction of Bomet, he saw a motorcycle approaching at a high speed and a pedestrian emerged on to the road. DW1 further testified that the motorcycle hit the passenger and the impact of the collision threw the rider (deceased) under the bus and he was run over by the hind wheels of the bus. When DW1 was cross examined, he testified that he did not see the collision between the motorcycle and the pedestrian but he heard a bang from behind.
26. The Appellant called Ronald Bosuben (DW2) who was a passenger in the Isuzu bus. His testimony mirrored DW1's testimony. When DW2 was cross examined, he stated that he did not see the rider being thrown off his motor cycle. That he blamed the rider as the accident happened in their lane.
27. The Appellant also called No. 77198 Cpl Evans Kondu (DW3) from Bomet Police Station. DW3 stated that on the material day, a pedestrian was crossing from the left side to the right side of the road when she was hit by the deceased's motorcycle and the rider fell on the right side of the road and was overrun by the Isuzu bus. That the Isuzu bus was not blamed for the accident. When DW3 was cross examined, he testified that he was not the investigating officer. That he was not conversant with the accident and that he followed the Occurrence Book extract.
28. In analysing the above evidence, the only people who could describe the circumstances of the accident was the investigating officer or an eye witness. It is clear that the Respondent (PW1) and No. 72792 PC



Raymond Nzaru (PW2) did not witness the accident. PW2 attempted to describe the circumstances of the accident based on the contents of the Police Abstract (P.Exh 5). I have looked at the Police Abstract and it confirmed the occurrence of the accident on the material day at 8.30 p.m. between motorcycle registration number KMDV 877Q and motor vehicle registration number KCE 815D. The Abstract also confirmed PW2's testimony that the accident was under investigations. In my view, in terms of ascertaining the circumstances of the accident, the Police Abstract was not helpful.

29. On the other hand, the driver (DW1) and the passenger (DW2) of the Isuzu bus were more competent to shed light on the circumstances of the accident. They all stated that on the material day, they saw a motor cycle being driven at high speed and soon thereafter they saw a pedestrian crossing the road. They both testified that they saw the motorcycle hit the pedestrian and the impact threw the rider onto their lane and under the bus. However, when they were cross examined, both of them stated that they did not see the collision between the motorcycle and the pedestrian.
30. Having analysed the testimonies of DW1 and DW2, I am not convinced as to their truthfulness. They contradicted their testimonies upon cross examination. Further, I agree with the Respondent that the Police Abstract only showed an accident between the motor cycle and the Isuzu bus. Additionally, PW2 was not cross examined about the presence of a pedestrian and the collision between the pedestrian and the deceased's motor cycle.
31. No. 77198 Cpl Evans Kondu (DW3) gave similar testimony to DW1 and DW2 on the circumstances of the accident. However, upon cross examination, he testified that he was neither familiar with the accident nor was he the investigating officer and that he based his testimony from an extract in the Occurrence Book. This testimony was hearsay as DW3 could not testify as to the circumstances of the accident as he did not visit the scene and by his own admission, he relied on the contents of the Occurrence Book which were filled by someone else. Furthermore, the Occurrence Book was not produced as evidence in the trial court.
32. Flowing from the above, it is clear to this court that the circumstances of the accident could not be deduced from the testimonies of PW1, PW2, DW1, DW2 and DW3. I agree with the trial court that the accident was not properly investigated because of the two conflicting testimonies of No. 72792 PC Raymond Nzaru (PW2) and No. 77198 Cpl Evans Kondu who all worked at Bomet Police Station. In the circumstances thereof, this court is at a loss on whom to blame for causing the accident. In *Hussein Omar Farah vs Lento Agencies (2006) eKLR*, the Court of Appeal observed that:-

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.....”

33. Similarly in *Postal Corporation of Kenya & another v Dickens Munayi (2014) eKLR*, Ngenye Macharia J. (as she then was) held that:-

“For the foregoing reasons, I am clear in my mind, that it is difficult to tell the extent to which each party (Respondent and Appellants' driver) contributed to the accident. And as rightly submitted by counsel for the Appellants, when the court is in doubt on the extent of contribution by either party, the most prudent thing to do is to apportion the contribution



at a ratio of 50%:50%. I therefore entirely concur with the findings in the cited cases of Haji -vs- Marair Freight Agencies LTD (1984) KLR, 139 in which the Court of Appeal held;

“Where it is proved by evidence that both parties are to blame and there is no means of making a reasonable contribution the blame can be apportioned equally on each

34. It is therefore my finding that the deceased and the Appellant were equally to blame for the accident and liability is thereby apportioned at 50:50.

Quantum

35. For this court as an appellate court to interfere with the award by the trial court, it must be convinced that the trial Magistrate acted upon some wrong principle of the law or that the award was extremely high or extremely low so as to make it erroneous. The same was espoused in the case of Gitobu Imanyara & 2 others vs. Attorney General (2016) eKLR, where the Court of Appeal held that:-

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.’

36. In regard to the pain and suffering, the trial court awarded Kshs 100,000/=. The Appellant submitted that award was excessive and it ought to have awarded Kshs 50,000/=. The Respondents submitted that the award of Kshs 100,000/= was reasonable. From the evidence on record i.e. the Police Abstract (P.Exh 5), the Post Mortem Report (P.Exh 3) and the Death Certificate (P.Exh 4), the deceased died on the material day (29th April 2017) which meant his pain was not prolonged. I have considered the case law submitted by the Appellant and I am in agreement that courts have usually awarded Kshs 10,000/= for pain and suffering in cases of instant death or if the deceased died on the same day as the accident. However considering the inflation rates, I find the trial court’s award of Kshs 100,000/= to be excessive and I hereby substitute it with an award of Kshs 50,000/= which in my view was just and reasonable.
37. On the issue of the loss of expectation of life, the trial court awarded Kshs 150,000/=. The Appellant submitted that the award was excessive and that an award of Kshs 100,000/= would be sufficient. The Respondent submitted that the award of Kshs 150,000/= was reasonable. I am guided by the persuasive case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (2017) eKLR, where Nyamweya J. (as she then was) held that:-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of



his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

38. In *Ndungu Wambui Christine, Grace Ngila & Benson Wambua v Muusi Nzivo Maingi aka Muusi Uzivo & David Maingi Nzivo* (joint Legal Representatives of Estate of Christine Mumbua) [2020] KEHC 1684 (KLR), the court awarded Kshs 100,000/= for a deceased who died aged 30 years old.

39. Based on the above, the conventional awards under loss of expectation of life are normally Kshs 100,000/=. However due to inflation rates, I find the trial court’s award of Kshs 150,000/= as reasonable and I hereby uphold the same.

40. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

41. The trial court awarded Kshs 2,400,000/= as loss of dependency. The Appellant submitted that the award under this head was excessive. That the trial court ought to have used the wage of Kshs 5,844.20/= being the minimum wage of a general labourer as provided under Regulation of Wages (General) (Amendment) Order 2015 and a multiplier of 20 years. On the other hand, the Respondent submitted that the trial court properly used a monthly salary of Kshs 10,000/= and a multiplier of 30 years.

42. In the Amended Plaintiff, the Respondent stated that the deceased had been employed as a driver and he died aged 30 years. In her testimony, the Respondent (PW1) testified that the deceased used to earn Kshs 15,000/= per month. I have gone through the record and there was no evidence of the deceased’s monthly salary. There was evidence in the form of the death certificate (P.Exh 4) that the deceased died aged 30 years old.

43. Courts normally use two systems in determining loss of dependency, one is the multiplier approach where a party has presented evidence of income and the other is the global sum approach where there is no evidence of income. In the case of *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs Gichumu Githenji* (2007) eKLR, where Ringera J. (as he then was) made the following observation:-

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”



44. Similarly, in *Frankline Kimathi Baariu & Lucy Muthoni Mwenda v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased)* [2020] KEHC 5897 (KLR), Mabeya J. held:-

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

45. Similarly in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) (2016) eKLR, Ngaah J. held as follows-*

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.....”

46. Persuaded by the above authorities and based on the fact that the deceased died aged 30 years and had four dependants, I find that the award of a global sum of Kshs 3,000,000/= to be reasonable and fair as an award for loss of dependency.

47. With regard to Special Damages, the Respondent particularized them as follows:-

- i. Funeral expenses Kshs 40,000/=
- ii. Post-mortem Kshs 10,000/=
- iii. Police Abstract Kshs 1,000/=
- iv. Letters of Administration Kshs 12,000/=

48. It was a ground of the Appeal that the trial court awarded the Respondent funeral expenses yet the same was not pleaded or proved. Firstly, as shown above, the Respondent pleaded for funeral and other related expenses at Kshs 40,000/=. The law allows courts to grant funeral expenses without the burden of having bereaved parties prove the same. Section 6 of the *Fatal Accidents Act* makes provision for funeral expenses as follows:-

In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.



49. In the case of Premier Dairy Limited vs Amarjit Singh Sagoo (2013) eKLR, the Court of Appeal stated that:-

“We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issue of record keeping when their primary concern is that a close relative has died”.

50. Similarly, the Court of Appeal, in Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited (2016) eKLR, stated that:-

“We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc....”

51. Guided by the precedents above, it is my finding that an award of Kshs 40,000/= for funeral expenses would be reasonable.

52. The Respondents produced a bundle of receipts as P.Exh 8. The bundle contained receipts for the Post Mortem Examination, Police Abstract and legal fee for Letters of Administration. I am therefore satisfied that the Respondent pleaded and proved their special damages as listed above. In totality, the trial court did not err and correctly awarded the Respondent Kshs 63,000/= as special damages, which I hereby uphold.

53. In the final analysis, the final award is as follows:-

- i. Pain and Suffering Kshs 50,000/=
 - ii. Loss of expectation of life Kshs 150,000/=
 - iii. Loss of dependency Kshs 3,000,000/=
- Kshs 3,200,000/=
- Less 50% Contribution Kshs 1,600,000/=
- Kshs 1,600,000/=
- Add Special Damages Kshs 63,000/=
- Total Kshs 1,663,000/=.

54. In the end, the Appeal dated 5th July 2023 succeeds to the extent that the amount awarded to the Respondent is reduced from Kshs 1,955,100/= to Kshs 1,663,000/=.

55. The Appellant is awarded half the costs of the Appeal while the costs of the suit shall remain as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY, 2025.

.....
R. LAGAT-KORIR



JUDGE

Judgement delivered in the presence of Mr. Migiro for the Appellant, No appearance for J.K. Rono for the Respondent, and Siele (Court Assistant).

